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April 29, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: July 28, 2004

Case No.: TIA-0148

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illnesses were not related to his work at a DOE facility. The OWA accepted the Panel's determinations, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part

852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D.¹ Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.² Subpart E provides that all Subpart D claims will be considered as Subpart E claims.³ OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as a laborer at the DOE's Los Alamos National Laboratory (LANL) for approximately nine months, during the summers of 1976, 1977, and 1978.

The Applicant filed an application with OWA, requesting physician panel review of four illnesses -- beryllium sensitivity, hypothyroidism, skin lesions, and combined hyperlipidemia. The Applicant claimed exposure to beryllium and beryllium dust.

The two-member Panel issued a negative determination for each illness. The Panel determined that the Applicant did not have beryllium sensitivity. The Panel determined that the Applicant had the other conditions, but they were not related to exposure at DOE. In the course of the Panel report, the Panel stated that the Applicant's measured

¹ Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).

² See *id.* § 3675.

³ See *id.* § 3681(g).

radiation dose was zero. With respect to the claimed hypothyroidism, the Panel found that the Applicant had the condition, noted that the Applicant's measured radiation dose was zero, and found that other toxins at the site were not associated with this condition. With respect to the claimed skin lesions, the Panel noted actinic keratoses on the forehead, stated that such lesions are usually the result of sun exposure, and noted the 24 year lapse of time between the Applicant's employment and the appearance of the lesion. Finally, with respect to combined hyperlipidemia, the Panel noted the absence of medical literature associating that illness with the toxins that existed at the site.

The OWA accepted the Panel's negative determinations. Subsequently, the Applicant filed the instant appeal, challenging the negative determination.

In his appeal, the Applicant argues that he has beryllium sensitivity. With respect to the other illnesses, he Applicant states that his work as a laborer exposed him to plutonium and other unknown toxic exposures. He argues that the Panel should have discussed the fact that he had a child with birth defects about a year and one-half after his DOE employment. Finally, he argues that his application should have been reviewed by a three-member physician panel.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant's assertion that he has beryllium sensitivity does not establish Panel error. The assertion is simply a disagreement with the Panel's medical judgment concerning the significance of his test results. We note that the

Panel's judgment is consistent with judgment of the physician that performed the test. Record at 61.

The Applicant's argument that he was exposed to plutonium and toxic chemicals in the course of his employment also does not establish Panel error. These substances were not identified in the original application. Because these are new assertions, the Panel did not have a chance to consider them. Moreover, given the logic of the Panel's decision, we do not believe they would have affected the Panel decision. The Panel noted the Applicant's measured radiation dose of zero and found no relationship between his illnesses and the other chemicals at the site.

The Panel's failure to discuss the Applicant's child does not demonstrate error. The Physician Panel Rule requires that the Panel state the basis of its determination. The Panel discussed the Applicant's medical and exposure history, including his dosimetry, medical and occupational records. The Rule does not require that the Panel address everything that the Applicant, on appeal, claims is relevant.

Finally, the Applicant's argument that he was entitled to a three-member panel is incorrect. Two physicians reviewed the application and issued negative determinations. In that case, referral to a third physician is not required.⁴

As the foregoing indicates, the Applicant has not demonstrated Panel error. In compliance with Subpart E, these claims will be transferred to the DOL for review. OHA's denial of these claims does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0148, and hereby is, denied.
- (2) The denial pertains only to the DOE claims and not to the DOL's review of these claims under Subpart E.

⁴ See 69 Fed. Reg. 13709, amending 10 C.F.R. §§ 852.2, 852.11, 852.16.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 29, 2005